LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 28 1975
MICHAEL RODAK, JR., CLERK

No. 74-842

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

TIDEE PRODUCTS, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

## BRIEF FOR INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, RESPONDENT, IN OPPOSITION

---

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036

*Counsel for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent*

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-842

---

THIDEE PRODUCTS, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, RESPONDENT, IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Whether the Board, upon finding that the employer's refusal to bargain collectively was based on frivolous grounds, may order the employer to reimburse the union, as charging party, for its expenses, including attorneys' fees, incurred in litigating the refusal to bargain charges.

2. Whether, if the Board has the power to impose such a remedy, enforcement of the Board's order was improper because the Board had never exercised such power in other cases.

## STATEMENT OF THE CASE

Tiidee Products, Inc., Petitioner herein, is engaged in the manufacture of metal and plastic parts for mobile homes and house trailers at its plant in Dayton, Ohio (A3). Prior to July 1967 its employees were unorganized. At that time the International Union of Electrical, Radio and Machine Workers, AFL-CIO, began organizing (A3). Tiidee engaged in a series of unfair labor practices in its efforts to defeat organization including statements to employees that organization would be useless because Tiidee would never recognize the Union but rather would close the plant (A9-14).

As the result of a representation petition filed by the Union, the NLRB conducted an election on September 14, 1967, which was won by the Union. Of the 24 employees in the appropriate unit (A5, fn. 3), 19 voted for the Union, 6 against and 3 were challenged (A5). Tiidee filed objections to the election on two grounds: (1) that the Union distributed a leaflet to the employees on the day of the election "which specifically changed the election issues established by [the] NLRB"; and (2) that the Union violated the Agreement for Consent Election by challenging employees who were on the eligibility list (A5). The Regional Director conducted an administrative investigation, and on the basis of his findings, issued a report overruling Tiidee's objections and certifying the Union as the exclusive bargaining representative of the employees (A5).

Tiidee responded to the announcement of the Union's success at the polls by Tiidee's president grabbing hold of the arm of the Union observer and berating her ungratefulness in front of the employees assembled to hear the NLRB agent read the election results (A14-15), locking the plant doors so that on the day following the election the employees arriving for work at the usual time could not enter the plant as they had always done in the past (A15), and discriminatorily laying off or discharging a majority of the employees in the bargaining unit (A15-21, 27-28, 40-41, 51-65, 75-76).

The Union filed a series of 7 charges with the NLRB, each covering the different unfair labor practices sequentially and two complaints issued, the first covering the original 4 charges and the second the last 3 charges, each complaint alleging violations of Section 8(a)(1), (3) and (5) (A1-3, 42-44). After the usual procedures, the Board found the unfair labor practices as charged. With respect to the refusal to bargain, the Trial Examiner found that Tiidee's asserted grounds for challenging the validity of the Union's certification were "frivolous" (A7) and the Board adopted this finding (A40).

Because of the frivolous character of Tiidee's asserted defenses and because of the flagrancy of Tiidee's unfair labor practices, the Union requested, first before the Trial Examiner (A31-32), and then by exceptions to the Board (A40-41), that the Board afford a remedy designed to make whole the employees and the Union for losses suffered by reason of the Company's insistence on litigating its frivolous contentions instead of obeying the law and bargaining (A. 31-32). The Trial Examiner rejected the Union's position, stating "As the remedy requested in the instant cases

involves both legal and policy questions which should be initially considered by the Board, I am not inclined to grant the remedy requested by the Union" (A32). The Board adopted the Trial Examiner's decision without mentioning the make-whole remedy issue (A40) and issued the usual orders directing Tiidee to cease and desist its unfair labor practices, to reinstate with back pay, bargain collectively with the Union and post notices (A37-41, 68-76).

On petition by the Union to the United States Court of Appeals for the District of Columbia Circuit, the court agreed with the Union that the Board had the power to enter the requested make-whole order (A114-119), at least in cases such as this where "The Company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous, and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director. The Company gave not a hint of support or explanation for its claim that the regional director acted 'arbitrarily and capriciously' " (A109).

The court accordingly remanded the case to the Board "for further consideration of the make-whole claim (while the remainder of the Board's order [was] enforced)" (A118). The court directed the Board "to make supplementary findings in the event the Board determines on remand that it should not grant make-whole relief, in whole or in part. If the Board believes that alternative remedies, beyond those already granted, are more appropriate, it should so state" (A118-119). Among the alternative remedies suggested by the court were an "award to the Union for excess organization

costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these" (A119, fn. 15).

On remand, the Board refused to enter a make-whole order, but did grant certain alternative remedies, only one of which is relevant here, namely, an order to "[p]ay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings" (A86). The Board's finding in support of this order is as follows (A84-85):

> "[F]rivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses."

When the cases came before the Court of Appeals for the second time on petitions by the Union chal-

lenging the failure of the Board on remand to grant a make-whole remedy and on petition by Tiidee to review the Board's new order, the court held that "the Board does have the power in appropriate cases to order" the award of attorneys' fees and other litigation expenses to the Board and the Union (A134-135). The court, however, modified the order by deleting all provisions for the payment to the Board of attorneys' fees and litigation expenses in litigating these cases (A145) and by limiting the Union's recovery to the "litigation before the Board in the initial *Tiidee I* and *II* decisions" (A147). The court stated the basis for its award of litigation expenses in the *Tiidee I* case was as follows (A145):

> "We sustain in principle the award of litigation expenses in this case because * * * the Company raised frivolous defenses before the Board".

With respect to the award of litigation expenses in the *Tiidee II* case the court stated (A147):

> "Although we believe that the Company's legal position in *Tiidee II* cannot fairly be characterized as frivolous, there is ample support in the record for the finding that its conduct in *Tiidee II* was also designed 'to postpone or avoid a lawful obligation to bargain' so that an award of litigation expenses properly is sustainable."

## ARGUMENT

1. The petition presents a portion of the question which this Court did not address in *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9, fn. 9 (1974). There this Court stated that it had "no occasion at this time to address the question whether the Board's broad powers under § 10(c), 29 U.S.C. § 160 (c), to fashion remedies includes power to order re-

imbursement of litigation expenses and excess organizational costs" (417 U.S. at p. 9, fn. 9). No issue as to the power of the Board to order reimbursement of "excess organizational costs" is presented by the instant case. There is presented the issue of the power of the Board to order reimbursement of litigation expenses incurred by a charging party, who after winning an election and being certified, is refused recognition by the employer solely on frivolous grounds (A7-8), and has no peaceful way of achieving recognition except by filing charges with the NLRB and participating in the ensuing legal proceedings. The petitioners and supporting *amicus* have failed to provide any decisional basis for doubting the power of the Board to order reimbursement for costs of litigation incurred by a union where the employer refuses to bargain although its grounds for refusing are frivolous. In these circumstances there is no basis for review by this Court.

2. There are no conflicting decisions. Petitioner concedes as much when it characterizes this case as presenting a "unique situation" (Pet. 3).

3. The decision below is in accord with established principles of law. This Court has repeatedly characterized Section 10(c) of the National Labor Relations Act as the grant of "broad discretion" to the Board to order an employer who has committed unfair labor practices "to take such affirmative action * * * as will effectuate the policies of the Act." *NLRB* v. *Food Store Employees, supra* 417 U.S. at 8. Cf. *Golden State Bottling Co., Inc.* v. *NLRB,* 414 U.S. 168, 176 (1973). The NLRB is thus granted remedial powers similar to those of equity courts to individualize its orders to provide a fair solution for correcting infringement of

rights. The English equity courts had "the power not only to give a fixed allowance for various steps in a suit, which is known as costs 'between party and party', but also as much of the entire expense of litigation of one of the parties as fair justice to the other party will permit". *Sprague* v. *Ticonic Nat'l Bk.*, 307 U.S. 161, 165, 166, fn.2 (1939). The erosion of the American rule against the award of attorneys fees has proceeded so rapidly in recent years, as to admit of no doubt but what the award by a court of litigation expenses to a party injured by frivolous litigation is proper. See *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 401-402 (1968); *Mills* v. *Electric Auto Lite,* 396 U.S. 375 (1970); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L.Rev. 792 (1966); Note: Awarding Attorney's Fees in School Desegregation Cases: Demise of the Bad Faith Standard, 39 Brooklyn L. Rev. 371 (Fall 1972). There is no reason for any different rule when it is an administrative agency rather than the court which considers allocation of litigation expenses.

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari should be denied.

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D.C. 20036
(202) 296-1206
*Counsel for International Union of Electrical, Radio and Machine Workers, AFL-CIO, Respondent*

February 27, 1975